Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

MITZI GREEN, Individually, and **JESSICA GREEN,** by and through her Guardian and Next Friend, **MITZI GREEN**
Petitioners

v.

CBS BROADCASTING INC., *48 HOURS*, DAN RATHER, CHUCK STEVENSON, BILL LAGATUTTA, and **SUSAN ZIRINSKY**
Respondents

On Petition for Writ of Certiorari to the Supreme Court of the United States of America

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether the First Amendment of the United States Constitution protects publication of defamatory statements characterized as "allegations" made against private or public individuals, regardless of whether the media knew, had reason to know, or should have known, that the allegations were false.

2. Whether the First Amendment of the United States Constitution protects publication of defamatory statements characterized as "opinions" made against private or public individuals, regardless of whether the media knew, had reason to know, or should have known that the "opinions" were in reality assertions of fact which were false.

3. Whether the privacy rights of a child rape victim as provided by the United States Constitution are violated by media broadcasts of an indicted child rapist displaying his victim's photographs, referring to the child by name, and proclaiming his innocence.

Parties to the Proceeding and Rule 29.6 Statement

All parties to the proceedings are listed in the caption of the case, and a corporate disclosure statement is not required by Petitioners pursuant to Rule 29.6 because the Petition is not filed "by or on behalf of" a corporation.

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Citations of Previous Opinions

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Green v. CBS Broadcasting Inc., 2000 WL 33243748 (ND Tex. December 19, 2000) (No. 98 CV 2740)

Statement of the Basis for Jurisdiction of the Supreme Court

The opinion of the Fifth Circuit was rendered on April 3, 2002. Rehearing was denied on May 6, 2002. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

Applicable Constitutional and Statutory Provisions

United States Constitution, First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Texas Civil Practice and Remedies Code §73.001, Elements of Libel: A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

Texas Civil Practice and Remedies Code § 73.002, Privileged Matters: (a) The publication by a newspaper or other periodical of a matter covered by this section is privileged and is not a ground for a libel action. This privilege does not extend to the republication of a matter if it is proved that the matter was republished with actual malice after it had ceased to be of public concern.

(b) This section applies to:

(1) a fair, true, and impartial account of:

(A) a judicial proceeding, unless the court has prohibited publication of a matter because in its judgment the interests of justice demand that the matter not be published;

(B) an official proceeding, other than a judicial proceeding, to administer the law;
(C) an executive or legislative proceeding (including a proceeding of a legislative committee), a proceeding in or before a managing board of an educational or eleemosynary institution supported from the public revenue, of the governing body of a city or town, of a county commissioners court, and of a public school board or a report of or debate and statements made in any of those proceedings; or
(D) the proceedings of a public meeting dealing with a public purpose, including statements and discussion at the meeting or other matters of public concern occurring at the meeting; and
(2) reasonable and fair comment on or criticism of an official act of a public official or other matter of public concern published for general information.

Texas Code of Criminal Procedure §57.02: Confidentiality of Files and Records *(See Appendix IV for full text of statute)*

Statement of the Case

On Nov. 19, 1998, Mitzi Green (hereinafter 'Mitzi') filed her Original Complaint and Jury Demand in the United States District Court for the Northern District of Texas, Dallas Division, individually and as Guardian and Next Friend of her daughter, Jessica Green (hereinafter 'Jessica'). This suit was filed against CBS *et al;(hereinafter referred to collectively as 'CBS' and individually by their surnames)* alleging libel, defamation, and invasion of privacy. The claims arose out of a *48 Hours* broadcast, which aired on Jan. 8, 1998 (hereinafter 'the Broadcast'). Adding insult to injury, after the Fifth Circuit denied Petitioners' Motion for Rehearing in May, 2002, CBS once again aired the Broadcast in June, 2002. Petitioners' suit was brought in federal court based upon diversity jurisdiction and an amount in controversy exceeding $75,000.00.

Summary judgment was entered against Petitioners on Dec. 19, 2000 (*see Appendix I.).* An Amended Final Judgment was entered on March 28, 2001, adding costs in the amount of $15,031.95 in favor of CBS. Petitioners filed their Notice of Appeal on January 16, 2001, in the Fifth Circuit pursuant to Title 28 U.S.C. §1291. On April 3, 2002, the Fifth Circuit affirmed the decision of the trial court *(See Appendix II.)* and on May 6, 2002 denied Petitioners' Motion for Rehearing. *(See Appendix III.)*

Argument Amplifying the Reasons for Allowance of the Writ

I. Factual Foundation Supporting the Petition

On Nov. 27, 1996, 43 residents of Roby, Texas won a Lottery jackpot of $46 million. Shortly thereafter, *48 Hours* producer Chuck Stevenson (hereinafter Stevenson) began working on the "Lotto Town" segment about this occurrence which eventually aired in January, 1998.

The Broadcast focused significantly on Lance Green (hereinafter 'Lance') who was one of the winners. When Lance won the lotto he was married to Mitzi (R. 1222, 1225) however, they were separated and Mitzi had filed for divorce (R.1223, 1331). Jessica is Mitzi's (then 3-year-old) biological daughter. Lance, however, is not Jessica's biological father nor did he adopt her (R 1220, 1331, 1298-99).

The Broadcast purported to be a news documentary about the Roby "millionaires." Instead, the Broadcast presented numerous unsolicited and defamatory references to Mitzi, and Jessica, a child victim of rape. CBS did so knowing that these individuals had never participated in any of the media circus sideshows regarding the Roby winners and in fact were adverse to any participation. In so doing, CBS broadcast numerous photographs of Jessica (without parental consent, digitalizing or masking).

Individuals in the Broadcast wrongly stated that Jessica's allegations of rape were false and instigated by Petitioners merely in an attempt to extort lottery winnings from Lance. References were made by CBS correspondent Lagattuta and Rather, and others in the Broadcast stating that Mitzi was somehow preventing Lance from visitation with Jessica in order to wrest Lance's lotto winnings.

A truthful presentation of the facts would have shown that prior to winning the lottery, Lance and his divorce attorney proposed a settlement, which included that Lance would not seek visitation with Jessica and required "a determination that Lance is not the biological father of the child [Jessica]" (R.1168-69, 1185-88) (R. 1269-71). This is the same man who woefully complained for the CBS camera that he was kept from seeing "his daughter" solely because Mitzi was after his money.

CBS broadcast this farce despite their knowledge that prior to Jessica's rape outcry, Mitzi had been allowing Lance to have visitation with Jessica. CBS had even attempted to film Jessica with Lance, however, Lance would not

permit it, telling CBS that Mitzi had instructed that Jessica was not to be filmed (R 1036, 1098-1101, 1103-05, 1150, 1292-97).

In February 1997, (prior to Jessica's rape outcry) Mitzi and Lance, reached an agreement in their pending divorce wherein Mitzi would receive approximately $7000.00 per year from the community property lotto winnings, leaving Lance with the lion's share of $33,000.00 per year (R. 1170-71, 1257, 1300-03, 1331). However, in April 1997, prior to finalizing this agreement, Jessica disclosed that Lance had raped her. (R.1229-30, 1233-36). It was up until this point that Mitzi had been allowing Lance to have visitation with Jessica whenever it was feasible (R. 1245, 1258-60, 1297, 1304) (despite his willingness to forego visitation as evidenced by his previous settlement proposal).

On May 16, 1997, Lance was indicted for aggravated sexual assault and indecency with a child. Jessica was identified in the indictment by pseudonym rather than by her name, pursuant to Chapter 57, Texas Code of Criminal Procedure (R 1306-07). Mitzi finalized her divorce the same day that Lance was indicted for raping her daughter, taking only $7000.00 per year of the Lotto winnings, ***the same amount Mitzi agreed to take prior to any rape allegations by Jessica*** (*emphasis added*) (R 1170-71, 1257, 1300-03, 1331-32). Mitzi made no attempt to change the terms of the agreement or increase the amount of money she would receive (R. *Id.*). Both Mitzi and her divorce attorney testified that money was not Mitzi's motivation; protecting her daughter was her goal (R 1170-71, 1332).

At the divorce hearing, Lance's attorney attempted to question Mitzi about the sexual allegations. However, after an objection by Mitzi's attorney, no further questions regarding this matter were allowed (R 1164-67). Mitzi sought and obtained a protective order for herself and Jessica; however, her application and the subsequent protective order made no references to Jessica's sexual abuse, instead focusing on family violence (R 107-114, 1178-1184).

CBS admitted that they did absolutely no research beyond what Lance was telling them regarding the rape charges or the divorce and didn't even review the public records at the courthouse (R. 1014-19, 1081-84, 1095, 1137, 1297, 1385-88). CBS also admitted that they were not present at the divorce hearing on May 16, 1997 (R 1083-4, 1095, 1137-38, 1146). CBS admitted that they were shown the indictment and were aware that Jessica was identified only by pseudonym, and also saw the divorce decree (showing the

$7000.00/$33,000.00 settlement) (R 1080, 1095, 1119, 1137). CBS via Stevenson admitted that they knew about community property laws in Texas and believed that Mitzi would be entitled to one-half of Lance's winnings (R. 1131). CBS admitted that they knew that Lance failed a polygraph regarding Jessica's allegations and the results of Jessica's rape examination yet did not bother to view or research either report (R 1019, 1081, 1093, 1132).

Mitzi testified that CBS made no attempts to contact her nor was she afforded any opportunity to tell "her side" of the story (R 1240-42, 1244, 1333). CBS admitted they had complete editorial control over the Broadcast, and could have edited or cancelled the Broadcast at any time up until its' airing (R 1034, 1040, 1112). Yet, even after Mitzi's attorney, Lance Hall, contacted CBS via letter and telephone, reminding them that the settlement concerning lottery proceeds was agreed upon prior to Jessica's sexual abuse allegations and that Mitzi never asked to increase this amount after the allegations were made, CBS chose to go forward (1042, 1143, 1150-51, 1174-77). Forward with a Broadcast which was libelous and defamatory, identified a child rape victim by name, and which gave Jessica's indicted rapist a forum in which he displayed multiple photographs of his alleged victim and (with assistance from CBS, Lagattuta, Rather, Bob Terry, and Lance's criminal attorney) proclaimed his innocence at the expense of Mitzi and Jessica (R 278).

II. ARGUMENT AND AUTHORITIES

A. Should the media be allowed to escape liability for defamation by merely labeling it as "allegations" and then hiding behind this designation?

The Fifth Circuit's sweeping adoption of the language found in two Texas intermediate court decisions[1] amounts to the creation of an absolute privilege for republishing defamation, and is a perversion of established legal precedent.

It is well-established legal precedent that one who republishes a libel is subject to liability as if he had published it originally, even though he attributes the statement to the original publisher. Restatement 2nd Torts §578 (1977) provides: "One who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it". Prosser, Torts §113 at 768 (4th ed.1971)."

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[1] *Dolcefino v. Randolph* 19 S.W.3d 906 (Tex.App.-Houston [14th Dist.] 2000, no pet). *KTRK Television v. Felder*, 950 S.W.2d 100, 106 (Tex.App.-Houston [14th Dist.] 1997, no writ)

The following cases illustrate this: *Kadetsky v. Egg Harbor Township Bd. of Educ.*, 82 F.Supp.2d 327 (D.N.J. 2000) ["true" repetition of a false charge is actionable]; *Levin v. McPhee*, 917 F.Supp. 230, 237 (S.D.N.Y.1996) [the defamatory meaning of the statement is not changed by its attribution to others.]; *Stone v. Banner Publishing Corp.*, 677 F.Supp.242, 245-46 (D.Vt.1988) [newspaper not protected merely because it repeated information provided by the police]; *Ricci v. Venture Magazine, Inc.*, 574 F.Supp.1563, 1572 (D.Mass.1983)[the rule in Restatement 578 "is essential to precluding a speaker's evasion of the rules protecting interests in reputation by stimulating another to make a statement, which the speaker then accurately repeats as the statement of the other"]; *Hoover v. Peerless Publications, Inc.*, 461 F.Supp. 1206 (E.D.Pa.1978) [statement that plaintiff "had some mental problems" could not be defended as mere expression of opinion by claim that the speaker simply collected information from others and passed it along without personally vouching for it. "This argument would make an 'opinion' out of every statement that is not based on personal knowledge and would run counter to the black- letter rule that one who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher, and even though he expressly disavows the truth of the statement"] *Id.* at 1209 (emphasis added); *Kelley v. Dillon*, 5 Ind. 426 (Ind.1854) ["... there is no legal difference between saying that a woman is a whore, and there is a report or rumor she is a whore..."]

In *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir.1980), a newspaper reported a mayor committed rape twelve years earlier and paid the victim to drop the charges. The Second Circuit reversed the dismissal of the complaint, holding that the fact that the newspaper was repeating charges made by others was not a defense. See *Olinger v. American Savings and Loan Assoc.*, 409 F.2d 142 (D.C.Cir.1969) [Statements in a letter from defendant to plaintiff's superiors were "true only because they were prefaced by 'Mrs. Olinger reports that.'" Id. at 144. Reversing summary judgment in favor of defendant, the Court found, "The law affords no protection to those who couch their libel in the form of reports or repetition...***[T]he repeater cannot defend on the ground of truth simply by proving that the source named did, in fact, utter the statement ...Any different rule would permit the expansion of a defamatory private statement, actionable but without serious consequences, into an article reaching thousands of readers, without liability on the part of the republisher."*** *Id.* (emphasis added)]

See also *Venn v. Tennessean Newspapers Inc.*, 201 F.Supp.47, 56-57 (M.D.Tenn.1962) aff'd 313 F.2d 639 (6th Cir.1963 cert.den.), and *Metcalf v.*

Times Pub. Co., 40 A. 864, 865 (R.I. 1898) ["If a man has not the right to go around (and) tell of charges made by one against another, much less should a newspaper have the right to spread it broadcast and in enduring form."]

Some cases refer to this concept as the "neutral reportage privilege" or "fair report privilege." This Court has not adopted a neutral reportage privilege (see *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 660, (1989)[2] [declining to decide the issue]. The 2nd Circuit in *Cianci*, supra at 67-70, defined the privilege as applying only to public figures and protecting only "accurate and disinterested" reports of public controversies where the journalist believes, reasonably and in good faith that his report accurately conveys the charges made. *Id.* at 68. The Court emphasized the very limited nature of this privilege stating: "The need for the careful limitation of a constitutional privilege for fair reportage is demonstrated by the breadth of that defense, which confers immunity even for publishing statements believed to be untrue. Absent the qualifications set forth by Chief Judge Kaufman in *Edwards*[3], all elements of the media would have absolute immunity to espouse and concur in the most unwarranted attacks, at least upon any public official or figure, based on episodes long in the past and made by persons known to be of scant reliability." *Id.* at 70.

The *Cianci* Court also noted, "It is equally clear...that a publisher who in fact espouses or concurs in the charges made by others or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage" but rather 'assumes responsibility for the underlying accusations'. Id. at 68.

Several state and federal appellate courts also have rejected the privilege entirely. See *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1225-1226 (3rd Cir. 1978); *McCall v. Courier-Journal & Louisville Times*, 623 S.W.2d 882 (Ky. 1981); *Postill v. Booth Newspapers, Inc.* 325 N.W.2d 511 (Mich.App. 1982); *Hogan v. Herald Co*, 84 A.D.2d 470. (N.Y.App.Div.1982).

Even assuming *arguendo* that some form of the "neutral reportage privilege" exists, this would not immunize defamatory statements about private figures like Mitzi and Jessica. Nor would it protect the Broadcast, which is hardly either an "accurate" or "disinterested" report of a public controversy.

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[2] In *Connaughten v. Hart Hanks Publishing, Inc.*, 842 F2d.825 (6th Cir.1988), the 6th Circuit, citing *Cianci*, deemed defendants' reliance upon "neutral reportage" "Misconceived and rejected it because the 'reportage' in the case at bar was neither accurate nor disinterested...The scope of the privilege is severely limited to ensure that the media is not granted absolute immunity to espouse and concur the mose unwarranted attacks..."

[3] *Edwards v. National Audubon Soc'y Inc.*, 556 F2d.113, 120 (2nd Cir. 1977, cert den.)

Among the courts that recognize the privilege in one form or another, almost all limit it only to publications of defamatory statements concerning public figures. For example, the 10th Circuit declined to apply the neutral reportage privilege to a defamation action by a private figure, stating: "The protections afforded the press when it reports on public officials and public figures do not shield it from liability when it publishes defamatory statements concerning private individuals." *Dixson v. Newsweek, Inc.* 562 F.2d 626, 631 (10th Cir.1977); see also *Crane v. Arizona Republic*, 729 F.Supp.698, 710 (C.D.Cal.1989) affd. in part, vacated in part (9th Cir.1992) 972 F.2d 1511. [Declining to extend a "public interest" privilege to private individuals.]

In *Brown v. Kelly Broadcasting Co.*, 771 P.2d 406 (Cal. 1989) the California Supreme Court stated: "[O]nly rarely will the report of false and defamatory accusations against a person who is neither a public official nor a public figure provide information of value in the resolution of a controversy over a matter of public concern....The report of such accusations can have a devastating effect on the reputation of the accused individual, who has not voluntarily elected to encounter an increased risk of defamation and who may lack sufficient media access to counter the accusations. As this court has remarked, '[a] reasonable degree of protection for a private individual's reputation is essential to our system of ordered liberty.'"

In *Fortenbaugh v. New Jersey Press Inc., and Morton R. Rabinowitz*, 722 A.2d 568, 576-578 (N.J.1999) the New Jersey Supreme Court rejected this privilege, stating: "The issue is whether a defendant who publishes a statement to the effect that a third party made a defamatory statement about plaintiff may escape liability by showing it was true that the third party made that statement...Plaintiff contends that it is the truth of the underlying conduct which must be shown, i.e., not only that a department chair accused plaintiff of publicly masturbating but that plaintiff in fact did so masturbate. There is considerable authority for the proposition that the fact that defendants accurately reported information obtained from another source will not relieve them of liability. Under that analysis the defense of truth does not refer to the truthful republication of a defamatory statement but to the truth of the statement's contents. Restatement (Second) of Torts § 578, comment b, at 235-36 (1977). Thus, if defendant published that a third person stated that plaintiff has committed a crime, ***it is no justification that the third party did in fact make that statement."*** (emphasis added).

See also, *Rogers v. Courier Post Co.*, 66 A.2d 869 (N.J. 1949) [Defendant must prove that in fact plaintiff committed the crime.] See L. Eldridge, *Law of Defamation* § 67 at 331 (1978). *Lawrence v. Bauer Pub. & Print. Ltd.*, 446 A.2d 469 (N.J. 1982) cert.denied, 459 U.S. 999 (1982) [It is necessary to find that the defamatory matter contained in the statement is true. When one person repeats a defamatory statement that he attributes to some other person, it is not enough for the person who repeats it to show that the statement was made by the other person. The truth of the defamatory charges that he has thus repeated is what is to be established. Restatement 2nd Torts, supra, §581(A) comment (e). See also Prosser and Keeton on Torts, supra, §116 at 841.

Texas law specifies the privileges to be applied in defamation cases in V.T.C.A., Civil Practice & Remedies Code § 73.002. There are two types of privileges in defamation cases-- absolute and conditional. *Hurlbut v. Gulf Atlantic Life Ins.Co.*, 749 S.W.2d 762, 768 (Tex. 1987) citing Restatement 2nd, Torts §583-612 (1977). Absolute privilege applies only in a limited number of situations that involve the administration of the branches of government. *Galveston County Fair & Rodeo, Inc. v. Glover*, 880 S.W.2d 112, 120 (Tex.App.1994, writ denied).

Based upon this extensive precedent, it is clear that the Fifth Circuit's holding is not only erroneous, it conflicts with well established black letter law and creates a blanket "get out of jail free" card for media defendants in defamation cases by allowing them to hide behind an impossibly irrefutable assertion that they are merely reporting "allegations" and therefore cannot be held accountable by their victims.

B. Should the media be allowed to escape liability for defamation by merely labeling it as "opinion" and then hiding behind this designation?

The First Amendment does not provide absolute protection to all statements of "opinion." Opinions that imply statements of fact do not receive absolute protection. See *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695 (1990).

One underlying rationale for the *Milkovich* holding was that expressions of opinion may be more than expressions of ideas; expressions of opinions sometimes imply assertions of objective facts that may be actionable in a defamation suit. *Milkovich*, 497 U.S. at 18-19 [noting that the statement "in

my opinion Jones is a liar" is as damaging as the statement "Jones is a liar" because it implies a false assertion of fact]. "*Milkovich* focuses on the harmful nature of the statements rather than an "artificial dichotomy between 'opinion' and fact." Id. at 19, *Gaylord Broadcasting Company, L.P. v. Francis*, 7 S.W.3d 279 (Tex.App.-Dallas 1999).

In *Mr. Chow of New York v. Ste.Jour.Azur.S.A. et al*, 11 Media L. Rep. 1713 (2d.Cir. 1985) the Second Circuit found that "...when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader the statements become more than 'opinion' and become inferences of fact. If an author represents that he has private, first-hand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact."

In the case at bar the defamatory statements in the Broadcast characterized by the Fifth Circuit as "opinion" were clearly statements of fact. i.e... "He just absolutely didn't do it." (rape Jessica)-Bob Terry; "This is not the way the story of an instant millionaire is supposed to end up."-Lagattuta; "Exactly. And this man is as innocent of—as anybody I've ever known in 38 years of practicing law."-Lance's criminal attorney. At the very least, genuine issues of material fact exist, such that a jury should decide the disputed evidence regarding "opinion" vs. factual allegations.

C. Should the media be allowed to violate the privacy rights of a child victim of rape by giving her indicted rapist a forum in which to display multiple photographs of her, referring to her by name, and proclaiming his innocence.

This case is distinguishable from any privacy case previously addressed by this or any other Court. There is no precedent which sanctions the violation of the privacy rights of a child rape victim in the manner employed by CBS. CBS did not mask the child's face, or utilize any available technology to protect her identity in any way. CBS did not omit references to the child by name, and in fact utilized her identity as part of their dramatized story line.

Under Texas law, an action for invasion of privacy will lie for four sorts of injuries: (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) Public disclosure of embarrassing private facts about the plaintiff; (3) Publicity which places the plaintiff in a false light in the public eye; (4) Appropriation, for the defendant's advantage, of the plaintiff's name

or likeness. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 682 (Texas 1976), quoting W. Prosser, Privacy, 48 Cal.L.Rev. 383, 389

Petitioners sought to recover under the privacy tort for public disclosure of embarrassing private facts, which has three elements: (1) publicity was given to matters concerning one's personal life, (2) publication would be highly offensive to a reasonable person of ordinary sensibilities, and (3) the matter publicized is not of legitimate public concern. *Industrial Found. at* 682.

Cox Broadcasting and its progeny do not protect CBS from liability for invasion of privacy under the facts of this case. As stated by Justice White in *Cox Broad. Corp. v. Cohn*, 95 S.Ct. 1029, 1041 (1975), there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the attendant publicity.

In *Cox Broadcasting*, the Court narrowly held that a State may not impose sanctions on the accurate publication of the name of a rape victim obtained from public records — more specifically, from judicial records maintained in connection with a public prosecution and which themselves are open to public inspection. CBS did not obtain their information from public records, or from information obtained in open court. CBS obtained their information, including photographs, from Jessica's alleged rapist, Lance. CBS had no idea what was contained in the public records because they did not see them. CBS were aware of the fact that Jessica had only been identified by pseudonym in the indictment.

The Court in *Cox* stated, "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." *Id.* At 1046. Texas has enacted Chapter 57 of the Code of Criminal Procedure, protecting the confidentiality of sexual assault victims. *Cox Broadcasting* is clearly distinguishable from the facts this case. In *Cox*, the Court noted, "Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection". *Id.* at 1046. Petitioners contend that CBS obtained Jessica's name and image in just such an "improper fashion."

In *Oklahoma Publishing v. District Court*, 97 S.Ct. 1045 (1977), the Supreme Court dealt only with information that had been obtained by the press in open

court. As previously noted, CBS admittedly did not obtain their information from any court hearing.
The ruling of the Fifth Circuit amounts to a ruling that a sexual assault victim impliedly consents to the publication of her identity and likeness merely by reporting a criminal offense, and that the filing of criminal charges is contingent upon a waiver of the claimant's right to assert the privacy of such information, even if that victim is a child. Such a holding would be a travesty.

In *Florida Star v. B.J.F.*, 109 S.Ct. 2603 (1989), this Court stated, "We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. *Id.* at 2613...Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily." *Id.* at 2608...Indeed, in *Cox Broadcasting*, we pointedly refused to answer even the less sweeping question "whether truthful publications may ever be subjected to civil or criminal liability for invading "an area of privacy" defined by the State...We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.*

Florida Star is also factually distinguishable from this case for the following reasons: (1) The plaintiff in *Florida Star* sued the newspaper for invasion of privacy based on the negligent violation of a statute, which made it unlawful for any person to print, publish, or broadcast the name of a victim of a sexual offense in any instrument of mass communication. 109 S.Ct. at 2606. This Court held imposing damages in those circumstances violated the First Amendment noting that in contrast to common law claims of invasion of privacy, the statutory scheme it was scrutinizing did not require case-by-case findings, nor did it require scienter of any kind. 109 S.Ct. at 2612. In the case at bar, Petitioners sued for invasion of privacy based on common law, which does require case-by-case findings.

(2) The *Florida Star* article was one of 54 "police blotter" stories printed that day. 109 S.Ct. at 2605-06. CBS broadcast Jessica's identity, photographs, and the fact that she was the alleged victim of sexual abuse to millions of households.

(3) The Florida Star alleged inclusion of the victim's name was inadvertent. *Id.* at 2606. CBS knowingly, intentionally, and repeatedly broadcast Jessica's name, photograph, and the fact that she was an alleged victim of sexual abuse to millions of households.

CBS was not publishing information about an exigent story that had just occurred. CBS worked on this story over a year. The story itself was about Lottery winners, not sexual assault. CBS admitted that they could have edited any references to Jessica's name, and photographs of Jessica, yet they made the conscious decision not to do so.

This Court in *Florida Star* also encouraged governments to do, like Texas with in Chapter 57, Code of Criminal Procedure, protect against publication of this information. "The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination." *Id.*

In this case, CBS did not "lawfully obtain truthful information about a matter of public significance". It is undisputed that CBS did not obtain their information from the public records and did not even know what the records contained.

Petitioners also contend that in the context and manner in which the information about Petitioners was published, it was not truthful nor was it a matter of public significance. The story presented by CBS was about 43 lottery winners, not about the commission and investigation of a violent crime that had been reported to authorities involving Petitioners. CBS' slanted, one-sided use of the sexual assault allegations in an attempt to present Lance as wrongfully accused, had no place in a show supposedly focused on lottery winners.

As Justice White points out in his *Florida Star* dissent, *Daily Mail* was careful to state that the "holding in this case is narrow...there is no issue here of privacy." *Id.* at 2615. Justice White also noted that at issue in *Daily Mail* was the disclosure of the name of the ***perpetrator*** of an infamous murder of a 15-year-old student. Justice White states, "***Surely the rights of those accused of crimes and those who are their victims must differ with respect to privacy concerns. That is, whatever rights alleged criminals have to maintain their anonymity pending an adjudication of guilt...the rights of crime victims to***

stay shielded from public view must be infinitely more substantial. *Id.* at 2614. (*emphasis added*). Justice White further noted, "As I see it, it is not too much to ask the press, in instances such as this to respect simple standards of decency and refrain from publishing a victims' name, address, and/or phone number." *Id.* at 2615.[4]

CBS not only repeatedly identified the child victim of sexual assault by name and photographs, they allowed her accused rapist to use their broadcast to declare his innocence and poison any potential jury pool that would eventually be called upon to decide his guilt or innocence.

As noted by Justice White, Florida enacted a statute intended to prevent the widespread distribution of rape victims' names (as Texas has also attempted to do by enacting Chapter 57, Code of Criminal Procedure) that "reflecting popular sentiment—has determined that disclosure of the fact that a person was raped is categorically a revelation that reasonable people find offensive. ***If the First Amendment prohibits wholly private persons...from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers or broadcast on television.***"[5] (*emphasis added).*
Justice White concluded by stating that the *Florida Star* decision "hit the bottom of the slippery slope. I would find a place to draw the line higher on the hillside: a spot high enough to protect B.J.F.'s desire for privacy and peace-of-mind in the wake of a horrible personal tragedy. There is no public

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[4] The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter...While I would not want to live in a society where freedom of the press was unduly limited, I also find regrettable an interpretation of the First Amendment that fosters such a degree of irresponsibility on the part of the news media. *Id.*

[5] The consequences of the Court's ruling—that a State cannot prevent the publication of private facts about its citizens which the State inadvertently discloses—is particularly troubling when one considers the extensive powers of the State to collect information. One recent example illustrates this point. In *Boettger v. Loverro,* 521 Pa. 366, 555 A.2d 1234 (1989), police officers had lawfully "tapped" the telephone of a man suspected of bookmaking. Under Pennsylvania law transcripts of the conversations intercepted this way may not be disclosed. 18 Pa.Con.Sta. §5703 (1988). Another statute imposes civil liability on any person who "discloses" the content of tapped conversations. §5725. Nonetheless, in a preliminary court hearing, a prosecutor inadvertently attached a transcript of the phone conversations to a document filed with the court. A reporter obtained a copy of the transcript due to this error, and his paper published a version of the remarks disclosed by the telephone tap. On appeal, the Supreme Court of Pennsylvania upheld a civil liability award of $1,000 against the paper for its unlawful disclosure of he contents of the phone conversations, concluding that individuals' rights to privacy outweighed the interest in public disclosure of such private telephone communications. *Boettger, supra,* at 376-377, 555 A.2d at 1239-1240.....I would strike the balance as the Pennsylvania Supreme Court did. *Florida Star,* at 2617.

interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime—and no public interest in immunizing the press from liability in the rare cases where a State's efforts to protect a victim's privacy have failed." *Id.* at 2619.

If CBS' conduct is allowed to stand unchallenged, we have truly fallen not just to the bottom of the slippery slope, but beyond that into the abyss, where anything and everything about our personal lives and the lives of our children is subject to some tabloid journalist's whim.

There is a presumption under Texas law that the public has no legitimate interest in private embarrassing facts about private citizens. *Industrial Found.*, 540 S.W.2d at 685. The determination whether a given matter is one of legitimate public concern must be made in the factual context of each particular case, considering the nature of the information and the public's legitimate interest in its disclosure. *Id.* While the general subject matter of a publication may be a matter of legitimate public concern, it does not necessarily follow that all information given in the account is newsworthy. See *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 274 (5th Cir.1989), cert. denied, 110 S.Ct. 326, *Anonsen v. Donahue*, 857 S.W.2d 700 (Tex.App.--Houston [1st Dist.] 1993, writ denied), cert. denied, 114 S.Ct. 2135 (1994).

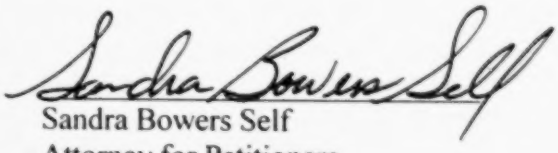
A logical nexus should exist between the rape victim's identity, or the private facts disclosed about the victim, and the general subject matter of the crime. *Id.* Private details about a rape victim or the victim's identity may be irrelevant when the details are not uniquely crucial to the case, or when the publisher's "public concern" goes to a general, sociological issue. See *Ross v. Midwest Communications, Inc*, 870 F.2d at 274-75 (5th Cir. 1989).

CBS could have told their story about Lance and the other winners, without referring to Jessica by name or showing her photograph. The manner and means utilized by CBS in their disclosures was, is, and should be highly offensive to any reasonable person.

PRAYER

For all the above reasons, Petitioners, Jessica and Mitzi Green, respectfully request that this Court grant this Petition for Writ of Certiorari in all things.

RESPECTFULLY SUBMITTED:



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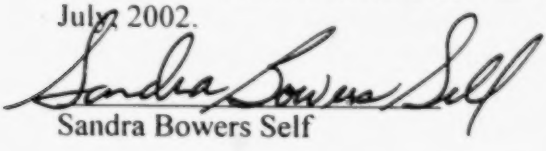
CERTIFICATE OF SERVICE

I hereby certify that the foregoing PETITION FOR WRIT OF CERTIORARI has been mailed via express mail to the office of the Clerk for the Supreme Court of the United States, and a true and correct copy of the same has been provided to counsel listed below in the manner indicated on this 31st day of July, 2002.



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APPENDIX
I.
Opinion of the District Court granting Summary Judgment

Green v. Broadcasting Inc., 2000 WL 3243748 (N.D. Tex. 2000. Dec. 19, 2000.Order Granting Defendants' Motion for Summary Judgment and Granting in Part Defendants' Motion to Strike.
MALONEY, District J.

Before the Court is Defendants' Motion for Summary Judgment, filed by Defendants CBS Broadcasting, Inc., *48 Hours,* Chuck Stevenson, Bill Lagattuta, Susan Zirinsky, and Dan Rather, on August 14, 2000. Also before the Court is Defendants' Motion to Strike, filed on September 20, 2000. After consideration, the Court concludes that Defendants' motion for summary judgment should be granted, and that Defendants' motion to strike should be granted in part.

Facts and Procedural History, [FN1]

On November 27, 1996, forty-two of the approximately 600 residents of Roby, Texas won the Texas Lottery jackpot of $46 million. The story of the overnight millionaires in the small west Texas town attracted the interest of the producers of Defendant *48 Hours* a weekly television news magazine published by Defendant CBS Broadcasting, Inc. Shortly after the Roby residents won, Defendant Susan Zirinsky, the executive producer of *48 Hours,* determined that the story of the Roby lottery winners was worthy of investigation as a possible *48 Hours* story. Zirinsky dispatched a producer, Defendant Chuck Stevenson, and a correspondent, Defendant Bill Lagattuta, to Roby to gather information on the lottery winners. Stevenson contacted the lottery winners and other residents of Roby in an effort to determine the impact of forty-two new millionaires on the small town. Stevenson spoke with many Roby residents during the thirteen-month period during which he developed the story.

> FN1. Although Plaintiffs have named *48 Hours* as a party defendant, it is unclear whether *48 Hours* is a separate corporate entity and, therefore, uncertain whether it has the capacity to be sued.

Stevenson and Lagattuta interviewed Lance Green, among other lottery winners. As their investigation of the story continued, Stevenson and Lagattuta learned that Lance's life had indeed changed after he won the

lottery. Several weeks before he won the lottery, Lance's wife, Plaintiff Mitzi Green, filed a divorce proceeding in which she also sought a division of the marital property. Through their respective attorneys, Mitzi and Lance had reached an agreement concerning the division of their community property assets. However, when Lance won the lottery, just ten days before the statutory waiting period for entering the divorce decree, Mitzi's attorney demanded half of Lance's lottery winnings as a part of the property settlement.

Lance helped raise Mitzi's daughter, Plaintiff Jessica Green. While Lance is not the biological father of Jessica, he is listed as the father on the child's birth certificate. Mitzi sought custody of Jessica in the divorce proceeding. After he won the lottery, but before the divorce was finalized, Lance alleged that Mitzi was preventing him from visitation with Jessica until he agreed to pay more money to Mitzi in the divorce settlement.

In April 1997, Mitzi accused Lance of sexually abusing Jessica, who was then three years old. The accusation ultimately led to Lance's indictment on sexual assault charges in May 1997. Lance asserted that Mitzi fabricated the sexual abuse charges in an effort to obtain more of his lottery winnings in the divorce settlement, which was still pending. Also during this time, in early 1997, Lance was a candidate for mayor of Roby. On May 16, 1997, Mitzi sought and obtained a protective order from the presiding judge in the divorce proceeding, based upon her allegations of sexual abuse. During the hearing on the protective order, at least one witness testified about the allegations in open court. Further, both Mitzi and Lance discussed the charges with others. Thus, many of the residents were familiar with the specifics of the charges, including the contentions of both sides and the identity of Jessica as the victim. In part as a result of the sexual abuse charges, Lance lost the mayoral race by a mere two votes. However, the sexual assault charges against Lance were ultimately dismissed by the trial judge after he determined that Jessica was incompetent to testify.

On January 8, 1998, CBS broadcast the *48 Hours* episode, titled "Lotto Town," which chronicled the lives of Roby residents after November 27, 1997. Defendant Dan Rather served as the news anchorman for "Lotto Town," and Lagattuta was the correspondent in Roby. Part of the hour-long episode was devoted to Lance's story: his struggle to earn a living at the local cotton gin, his change of circumstances after winning the lottery, and whether his good fortune could buy him happiness.
In an on-camera interview by Lagattuta, Lance responds to questions about

the impending divorce and his desire to see Jessica. In one segment, Lance laments his inability to see Jessica, while displaying a picture of her. Lance and others comment on the criminal charges against him and his claim that his wife fabricated the allegations for financial gain. He also discusses his failed run for mayor.

Based on the "Lotto Town" broadcast, Plaintiffs Mitzi and Jessica Green filed the instant action against Defendants, alleging claims for defamation and invasion of privacy. Mitzi contends that the story falsely implies that she is a liar and a "gold digger." Plaintiffs further assert that the identification of Jessica in the story, including her name and the display of her photograph by Lance, constitutes an unlawful invasion of their privacy.

Defendants generally deny the allegations of Plaintiffs' complaint and now seek summary judgment. Defendants argue that Plaintiffs' claims fail as a matter of law because the statements made in the broadcast concerning Plaintiffs were, in fact, true. Thus, because the truth provides a complete defense to a cause of action for defamation, Plaintiffs' claims are not actionable. Furthermore, Plaintiffs' claims for invasion of privacy should likewise fail because the publication of Jessica's name and likeness are not private facts.

Motion to Strike

Defendants object to, and move to strike certain evidence submitted by Plaintiffs in support of their opposition to Defendants' motion for summary judgment. Thus, as an initial matter, the Court will consider the admissibility of certain exhibits offered by Plaintiffs.

As their first basis of objection, Defendants argue that a report of the results of a polygraph examination of Lance Green, which is attached to his deposition (exhibit 10), is inadmissible hearsay and irrelevant. Plaintiffs offer the polygraph results as evidence that Defendants should have considered before broadcasting the *48 Hours* episode. Moreover, Lance testified during his deposition that the results of that (first) polygraph examination were inconclusive. However, the report, prepared by a Texas Department of Public Safety officer, indicates that Lance's responses indicated deception. Thus, Plaintiffs argue that the report is admissible to impeach Lance's testimony. The Court agrees that the report is admissible for purposes of impeachment, and to that extent it is admissible. *See* FED. R. EVID. 401 and 801. [FN2] Defendants' objection is overruled.

FN2. Defendants do not question the authenticity of the report.

Defendants next object to Mitzi Green's affidavit (exhibit 14). Defendants argue that the entire affidavit should be stricken because it contains argument, conclusions, and speculation. For example, Defendants initially complain that in paragraph 4 of her affidavit Mitzi asserts that Lance sexually assaulted Jessica. Defendants suggest that Mitzi's statement should be stricken because it is not based upon personal knowledge and, therefore, it does not conform to FED. R. CIV. P. 56(e). However, the statement simply states that Mitzi moved from Roby after she separated from Lance, and only returned "for court proceedings in connection with [her] divorce and criminal proceedings that were later filed against Lance Green for sexual abuse of [her] daughter, Jessica." It is clear that Mitzi is not asserting facts beyond her personal knowledge because she was aware that Lance was indicted for sexual assault against Jessica. Additionally, the statement merely explains the limited purpose for her return to Roby. Therefore, Defendants' objection is overruled.

Defendants object to portions of Mitzi's affidavit in which she refers to statements made by her aunt and mother to Defendant Stevenson. Such statements are clearly hearsay and therefore inadmissible pursuant to FED. R. EVID. 802. Accordingly, Defendants' objection is sustained to that extent.

The next portion of Mitzi's deposition testimony to which Defendants object is her statement, "Lance knew that money was not the issue for me." (Plaintiffs' App. p. 320). To the extent that the statement relies on speculation as to Lance's state of mind, it is not based upon personal knowledge. Accordingly, Defendants' objection is sustained as to that objection.

As their last objection to Mitzi's affidavit, Defendants' complain that the last paragraph is conclusory and devoid of factual support. In the final paragraph, Mitzi summarizes the harm sustained by her and Jessica as a result of the broadcast, and she explains why she took certain actions. In that respect, the evidence is admissible. However, Mitzi states that Jessica "continues to have counseling because of what Lance Green did to her." She also states that Lance will go unpunished "for what he did to my daughter." Whether Lance has caused injuries to Plaintiffs or whether he will go unpunished for his actions is immaterial to this action. In this proceeding,

Plaintiffs seek redress for alleged injuries to their respective reputations as a result of conduct by the media Defendants. Therefore, Defendants' objections on the basis of relevance are sustained.

Finally, Defendants object to the affidavit of Frederick R. Blevens, Ph.D., it its entirety. Blevens, a purported expert in the field of journalism, states: "[I]t is my professional opinion that Mitzi Green is a private person for all purposes. It is also my professional opinion that CBS' conduct in this matter was negligent and that their conduct rises to the level of actual malice." As Plaintiffs point out in their opposition, the purpose of Blevens's affidavit is to provide expert testimony, *inter alia,* on whether the statements by Defendants constitute libel and whether the broadcast violates Jessica's right to privacy. Defendants contend that Blevens's statements are nothing more than legal opinions and they object to his testimony on that basis.Federal Rule of Civil Procedure 56(e) provides that opposing affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence.

With respect to expert witness testimony, FED. R. CIV. P. 702 states that such testimony may be introduced into evidence if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." The United States Court of Appeals for the Fifth Circuit has repeatedly held that legal opinions are not a proper subject of expert testimony. *Estate of Sowell v. U.S.,* 198 F.3d 169, 171-172 (5th Cir.1999) (forbidding expert testimony on whether a fiduciary was "acting reasonably"); *Askanase v. Fatjo,* 130 F.3d 657, 673 (5th Cir.1997) (holding that the trial court properly excluded expert testimony as to whether corporate officers breached their fiduciary duties to the corporation); *Salas v. Carpenter,* 980 F.2d 299, 304-305 (5th Cir.1992) (concluding that an expert in the field of hostage negotiation cannot offer opinion testimony on whether the defendant exhibited "deliberate indifference or conscious disregard" for the safety of the victim).

The Court concludes that Blevens's legal conclusions are not helpful for the trier of fact to understand the evidence. *See* FED. R. EVID. 702. While Rule 704 allows an expert to offer opinions which may embrace an ultimate issue of fact, it does not allow legal conclusions. Opening the door to ultimate issues does not "open the door to all opinions." *Owen v. Kerr-McGee Corp.,* 698 F.2d 236, 240 (5th Cir.1983). Thus, opinions that tell the trier of fact what result to reach are not permitted. *Id.* Just as the Fifth Circuit has affirmed the exclusion of expert testimony on the defendant's state of mind, *Salas,* 980 F.2d at 305; and whether a defendant breached a particular duty

of care, *Askanase,* 130 F.3d at 673--Blevens's opinion that Mitzi is not a "public figure," and that Defendants' conduct was negligent and malicious is inadmissible. Thus, Defendants' objections are sustained to the extent that Blevens states legal opinions.

Summary Judgment Standard

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The movant bears the burden of establishing the propriety of summary judgment, and all pleadings and evidence are viewed in the light most favorable to the nonmovant. *Melton v. Teachers Ins. & Annuity Ass'n of America,* 114 F.3d 557, 559 (5th Cir.1997). As such, the movant must inform the court of the basis of its motion and identify the portions of the record which reveal there are no genuine material fact issues. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The function of the court, therefore, is to make the threshold inquiry of determining whether there is a need for a trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). [FN3]

> FN3. *See also Crawford-El v. Britton,* 523 U.S. 574, 600 (1998) ("Summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial.").

Once the movant makes this showing, the nonmovant must demonstrate that there is evidence in the record establishing that there is a genuine issue of material fact for trial. *Id.* at 323-24. To carry this burden, the opponent must do more than simply show some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). A dispute as to a material fact is "genuine" under Rule 56(c) only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson,* 477 U.S. at 251-52. The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to preclude a grant of summary judgment. *Stewart v. Murphy,* 174 F.3d 530, 533 (5th Cir.1999). The opponent must present evidence sufficient to support a resolution of the factual issue in his favor. *Anderson,* 477 U.S. at 249. The court may properly enter summary judgment against a party if that party fails to establish the existence of an element essential to the case and as to which it will bear the burden of proof at trial. *Celotex,* 477 U.S. at 324-236. Summary judgment is also appropriate when the only issues to be decided in the case are issues of law, or when the non-moving party's claims

are legally deficient. *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1065 (5th Cir.1995); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1257 (5th Cir.1995).

Defamation Claims

Libel is a defamatory statement expressed in written or other graphic form that tends to injure a person's reputation and thereby exposes the person to "public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury." TEX. CIV. PRAC. & REM. CODE ANN. § 73.001. Whether words are capable of defamatory meaning is a question of law for the court to decide. *See Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 654 (Tex.1987). Thus, to prevail on a libel claim, a plaintiff must establish that the defendant published false statements which injured the plaintiff's reputation. *Casso v. Brand*, 776 S.W.2d 551, 557 (Tex.1989).

The truth of a statement which forms the basis of the libel is a defense to the action. TEX. CIV. PRAC. & REM. CODE ANN. § 73.005. The Texas Supreme Court has adopted a "substantial truth" test to determine whether the offending statement is true. *McIlvain v. Jacobs*, 794 S.W.2d 14, 15 (Tex.1990). A broadcast is substantially true if the alleged defamatory statement is not more damaging to the plaintiff's reputation in the mind of the average listener, than a truthful statement would have been. [Citations omitted.] *Id.* at 16. Accordingly, a court must examine the "gist" of the broadcast in evaluating its substantial truth. *Id.* A showing that the gist of the broadcast is substantially true will defeat a cause of action for defamation. *McIlvain*, 794 S.W.2d at 15.

Plaintiffs premise their defamation claims on certain excerpts of the broadcast, which report on the allegations of sexual abuse against Lance and his contention that Mitzi fabricated the story to obtain a more favorable divorce settlement. Therefore, the Court will examine the statements contained in the "Lotto Town" broadcast as a whole, in light of the surrounding circumstances, to determine whether a person of ordinary intelligence would perceive the broadcast as defamatory of Plaintiffs. *Id.* at 655.

In excerpt 1, Defendant Rather provides a voiceover while Lance discusses the possibility of not seeing Jessica again:

Rather: "Lance thought that winning was his ticket to a better life."

Lance: "This is the hardest thing I've ever been through personally."

Rather: "But now he could lose the most important thing of all."

Lance: "Chances are I probably will never see my daughter again.

Plaintiffs concede that the statements are not libelous. However, they argue that the excerpt "sets the stage" for later statements which convey to the viewing audience a "false understanding" that Mitzi is keeping Jessica away from Lance in an attempt "to extort money from him." Additionally, Plaintiffs complain that Defendants should not have broadcast Lance's reference to Jessica as his "daughter" because Defendants were aware that Jessica was Lance's stepdaughter.

Texas courts have rejected the theory of libel by implication. *Randall's Food Markets, Inc. v. Johnson,* 891 S.W.2d 640, 646 (Tex.1995); *KTRK Television, Inc. v. Fowkes,* 981 S.W.2d 779, 789 (Tex.App.--Houston [1st Dist.] 1998, writ denied); *Hardwick v. Houston Lighting & Power Co.,* 943 S.W.2d 183, 185 (Tex.App.--Houston [1st Dist.] 1997, no writ). Thus, as a matter of law, literally true statements cannot be libelous because others may infer dishonesty. *Id.* The truth is a *complete* defense to libel, notwithstanding any inferences that may be drawn therefrom. *See id.* "To hold otherwise would chill the reporting of factual news because one might always infer negative implications from an event that actually occurred." *KTRK Television,* 981 S.W.2d at 789.

Because Plaintiffs concede that the statements in excerpt 1 are not libelous in and of themselves, their claim as to that excerpt fails as a matter of law. They cannot avail themselves of the implications drawn from the statements. Further, the Court concludes that the offending statements, made by Lance, are substantially true.

The relevant portions of excerpt 2 involve a voiceover by Defendant Lagattuta and Lance's statements about Jessica:

Lagattuta: "With all he's got going now… you'd think Lance would have a lot to smile about, but he's not smiling."

Lance: "There's Jesse when she was about nine months old" [Lance displays a picture of Jessica]

Lagattuta: "Lance and his wife separated months before the lottery win."

Lance: "this is her when she's about – nearly two years old."

Lagattuta: "And his wife took back the stepdaughter Lance had helped raise since birth."

Lance: "This was back during the summer. I haven't seen her in quite a while."

Lagattuta: "Now Lance's sudden good fortune is opening old wounds. His ex-wife wants money and Lance says she's keeping him from little Jesse until she gets it, charges the ex-wife denies."

Mitzi contends that she did not take back Jessica. She also maintains that she did not want money, as Lagattuta states, and she was not withholding Jessica until she received it. To that extent, Plaintiffs argue that the segment was false.

Where a libel case involves media defendants, as here, the defendants need only prove that third-party allegations reported in a broadcast were in fact made--they need not demonstrate that the allegations themselves are substantially true. *Dolcefino v. Randolph,* 19 S.W.3d 906, 918 (Tex.App.--Houston [14th Dist.] 2000, no writ); *Dolcefino v. Turner,* 987 S.W.2d 100, 109 (Tex.App.--Houston [14th Dist.] 1998, pet. granted); *KTRK v. Felder,* 950 S.W.2d 100, 106 (Tex.App.--Houston [14th Dist.] 1997, no writ) (citing *McIlvain,* 794 S.W.2d at 16). Accordingly, in order to establish the substantial truth of Lance's allegations against Mitzi, Defendants are required to show only that he made them.

Defendants have established that the statements in excerpt 2 were made and are substantially true. In her deposition, Mitzi admits that she requested money from Lance for child day care expenses. Additionally, her divorce attorney testified that, after Lance won the lottery, Mitzi initially demanded at least half of the lottery winnings after the parties had agreed to a property settlement. Before the broadcast was aired, Lance alleged that Mitzi wanted more money and she was withholding visitation with Jessica until she received the money. Lagattuta states, "Lance says she's keeping him from little Jesse until she gets it, charges [Mitzi] denies." Thus, Defendants have properly attributed the statements to Lance, who made the allegations against Mitzi, and accurately stated that Mitzi denies the allegations.

Moreover, the Court concludes that the statements are not actionable because they do not tend to expose Plaintiffs to public hatred, contempt, ridicule, or financial injury. Again, Plaintiffs cannot be libeled by implication.

Plaintiffs also complain that the report omitted certain facts favorable to her which would have undermined Lance's contention that she was using Jessica to get more money. For example, Mitzi suggests that the report should have stated that she was entitled to half of Lance's lottery winnings under Texas community property law. However, Defendants' editorial decisions and newsworthiness judgments concerning the content of its broadcast are not subject to review by the courts. *See Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 258 (1974) (recognizing that the First Amendment of the United States Constitution prohibits governmental interference with the editorial decisions of the press). Therefore, Plaintiffs cannot prevail on their defamation claims by suggesting that Defendants should have included other, more favorable information about them in the "Lotto Town" broadcast. "[A] media defendant's decision to exclude certain information from a broadcast does not render an otherwise truthful statement false." *Evans v. Dolcefino,* 986 S.W.2d 69, 78 (Tex.App.--Houston [1st Dist.] 1999, no pet.). *See also HBO v. Huckabee,* 995 S.W.2d 152, 161 (Tex.App.--Houston [14th Dist.] 1998), *aff'd,* 19 S.W.2d 413 (Tex.2000).

In excerpt 3, Plaintiffs allege the falsity of statements by Rather and Lance:

Lance: "Chances are, I probably will never see my daughter again."

Rather: (Voiceover) "He doesn't feel like a lottery millionaire."

Lance: (Voiceover) "It's hard to lose a daughter."

Rather: (Voiceover) "What money cannot buy."

Again, Plaintiffs contend that the statements convey the idea that Mitzi is withholding Jessica from Lance until she receives some of his lottery winnings. Clearly, none of the statements tend to expose Plaintiffs to public hatred, contempt, or ridicule. As such, the cited statements do not constitute actionable libel.

Excerpt 4 states as follows:

Lagattuta: (Voiceover) "Lance Green didn't become mayor. And as a matter of fact, he didn't become a millionaire. That's because he made a decision many lottery winners across America make today – to take what's know as a buy-out; that is, sell your future shares in the lottery to a private broker for a lump sum payment now. Trouble is, that lump sum is not for the full amount. In fact, in Lance Green's case, he ended up with, after taxes, roughly thirty cents on the dollar."

Lance: (Voiceover) "My decision was made for me. I had some personal problems and I had to have a – great deal of money right now."

Lagattuta: "You needed the money to help pay…"

Lance: "Legal costs."

Lagattuta: "How do you feel about this?

Lance: "I had to have the money. There's no two ways about it.

Plaintiffs do not contend that the cited excerpt is inaccurate in any aspect; rather, they argue that the statements exemplify the broadcast as a whole, which is the "ongoing bashing of Mitzi." Inasmuch as Plaintiffs cannot state a cause of action for libel by implication, the Court concludes that the statements in excerpt 4 do not amount to libel. However, Plaintiffs suggest that excerpt 4 is a lead-in to defamatory statements in excerpts 5 and 6.

Excerpt 5 contains statements by Lance and Bob Terry, a resident of Roby, concerning Lance's relationship with Mitzi:

Terry: "He married a – a woman, a girl, and Lance loved her.

Lance: "I wish things had turned out different."

Terry: "He loved her and he loved her little baby."

Lance: "So there's really not a whole lot to talk about."

Terry: "A little before Lance won these millions, she was divorcing him, and she didn't make any bones, from what I hear, that – that she was gonna divorce him and try to get the alimony out of him."

Lance: "Chances are I probably will never see my daughter again."

Terry: "The day or two before the divorce was final, she came back and tore up the papers and said she wanted half the – the lotto, and he refused her."

Plaintiffs contend that Terry's statement is an example of the "ongoing attempts by Defendants to make Mitzi look like a gold digger." Plaintiffs also suggest that there is a factual issue as to whether Mitzi "tore up the papers" related to her divorce settlement after Lance won the lottery.

The Court concludes that Terry's statements are substantially true. Essentially, Terry states that Mitzi was in the process of divorcing Lance before he became a lottery winner. After he won, Mitzi repudiated the community property settlement to which she had agreed, and sought half of Lance's lottery winnings. In her original divorce petition, Mitzi sought spousal support--a fact that she admitted in her deposition. Thus, Terry's statement that Mitzi was divorcing Lance and seeking alimony is correct. Further, both Lance and Mitzi's divorce attorney testified that after Lance won the lottery, Mitzi demanded more than half of his winnings, despite the fact that the parties had already agreed to a property settlement. Lance rejected the demand. Accordingly, whether Mitzi literally "tore up" the settlement papers is immaterial because the gist of the statement is that she sought to alter the settlement agreement.

Excerpt 6 introduces the audience to the sexual assault charges against Lance:

Lagattuta: (Voiceover) Eventually Lance reached a financial agreement with his ex-wife. But that wasn't the end of his troubles."

Lance: "It's incredible. Never imagined it in my life. You don't see that kind of thing in—in Roby."

Lagattuta: (Voiceover) "Six months after the lottery win, Lance's ex-wife accuses him of sexually assaulting her three year-old daughter Jesse, and a grand jury indicts him."

Terry: "It's just out of character with Lance. He just absolutely didn't do it."

Again, Plaintiffs argue that the statements infer that Mitzi is a liar and a "money-grubbing, vindictive .woman." Taken as a whole, the statements portray Mitzi as "the worst of all possible mothers, using her daughter to extort money from Lance," and falsely accusing him of sexual assault. Plaintiffs contend that no reasonable person could infer differently.

Notwithstanding any inference that may be drawn from the excerpt, the statements are substantially true and, therefore, they are not actionable. It is true that Mitzi and Lance had reached a community property settlement before Lance won the lottery. In her deposition, Mitzi admitted that, approximately six months after he won the lottery, she accused Lance of sexually assaulting Jessica--an accusation which prompted the grand jury to indict Lance on charges of sexual assault. Further, Terry's statement that Lance "didn't do it" is simply his opinion, which is not directed at Plaintiffs and in no way causes public hatred, contempt, or ridicule of them.

Lance and his criminal defense attorney, Aubrey Roberts, discuss his innocence in excerpt 7:

Lance: (Voiceover) "In my heart, I feel the truth will come out. My ex-wife will get what's coming to her and I'll have my baby."

Roberts: "You – you know that it'll come out all right for you because you're innocent."

Lagattuta: (Voiceover) "That's Lance's criminal lawyer, Aubrey Roberts."

Lagattuta: (To Roberts) "You believe that a large reason why he's in this mess today is because he's got some money."

Roberts: "I think that's the total reason. There's a lot of people out to separate a man from his money."

Basically, Plaintiffs argue that excerpt 7 portrays Lance as an innocent victim, while vilifying Mitzi. They contend that the segment implicitly accuses Mitzi of falsifying criminal charges against Lance, which constitutes defamation *per se*. Plaintiffs further complain that Defendants should have maintained the focus of their story on the Roby millionaires, and should not have delved into Lance's personal life.

Once again, Plaintiffs attempt to establish a claim for libel by implication. However, their current effort is no more successful than before. None of the cited statements tend to cast aspersions on Plaintiffs' reputations. Further, Lance's defense to the criminal charges was based on his contention that the allegations were fabricated by Mitzi. Defendants accurately reported Lance's cross-allegations against Mitzi and, therefore, the Court concludes that the statements are substantially true.

Continuing on the subject of Lance's criminal charges, excerpt 8 is as follows:

Roberts: "He had his future absolutely paved for him. And he could have done many things that he would have liked to have done. Now he must do this."

Lagattuta: "This is not the way the story of an instant millionaire is supposed to end up."

Roberts: "Exactly. And this man is as innocent of – as anybody I've known in thirty-eight years of practicing law."

Lagattuta: "Do you find it odd that we're doing an interview and we have to have your lawyer present?"
Lance: "Not no more."

Lagattuta: "That's the way life is now."

Lance: "That's – that's the way life is when you win the lottery. A lot of things have changed. It's hard to lose a daughter. You got 'em for three years and all of a sudden you don't have them anymore. It hurts."

Lagattuta: "And no amount of money can make up for that?"

Lance: "Oh, Lord no"

Plaintiffs argue that Roberts's statement concerning Lance's innocence has the effect of implying that the charges were fabricated. Nonetheless, the Court concludes that the statements are not actionable for at least three reasons: first, Plaintiffs cannot establish libel by implication; second, the gist of the statements is substantially true; and, third, the statements do not tend to expose Plaintiffs to public hatred, contempt, or ridicule.

Finally, in excerpt 9, Lance states: "Personally, nothing has changed as far as my friends, neighbors. People will fight for me to the bitter end." Plaintiffs recognize that the statement is not defamatory. However, they again assert that the broadcast as a whole infers that Mitzi is simply out to get Lance's money, and she will lie to achieve her object. It is obvious that the statement is not defamatory as a matter of law, and Plaintiffs cannot avail themselves of any implications which may be derived from the statement. The statement meets the "substantial truth" test and, therefore, it is not actionable.

In summary, Plaintiffs have failed to establish that Defendants published false, defamatory statements about them. [FN4] The gist of the statements in the excerpts, individually and considered as a whole, are substantially true, notwithstanding any implications that may be derived from them. Accordingly, there is no genuine issue of material fact as to the substantial truth of the statements and Defendants are entitled to judgment as a matter of law on Plaintiffs' defamation claims.

> FN4. Because the Court concludes that Plaintiffs have failed to establish the falsity of Defendants' statements, the Court need not consider whether Plaintiffs are "public figures" under *Trotter v. Jack Anderson Enterprises*, 818 F.2d 431, 433-434 (5th Cir.1987).

Invasion of Privacy Claim

Plaintiffs' invasion of privacy claim is premised on Defendants' broadcast of Jessica's name and photograph in the "Lotto Town" episode of *48 Hours*. To establish a cause of action for invasion of privacy under Texas law, the plaintiff must show: (1) that publicity was given to matters concerning her private life; (2) that the publication of those matters would be highly offensive to a reasonable person of ordinary sensibilities; and (3) that the matters publicized are not of legitimate public concern. *Industrial Foundation of the South v. Texas Industrial Accident Bd.*, 540 S.W.2d 668, 682 (Tex.1976) (citing W. PROSSER, LAW OF TORTS § 117, at 809 (4th ed.1971)). Thus, the first requirement for wrongful publication of private information is that the information contain highly intimate or embarrassing facts about a person's *private* affairs. *Id.* at 683. However, the publication of facts, no matter how intimate or embarrassing, which are a matter of public record, does not set forth a cause of action for invasion of privacy. *Id.* at 684.

As an initial observation, Jessica's name and likeness are not private facts. *Johnson v. Sawyer*, 47 F.3d 716, 731 (5th Cir.1995) (*en banc*); *Ross v. Midwest Comm., Inc.*, 870 F.2d 271, 274 (5th Cir.1989). Essentially, Plaintiffs' claim relates to the publication of Jessica's identity as the victim of sexual abuse. [FN5] In her deposition, Mitzi admitted that the details concerning the sexual abuse allegations were discussed in open court during a hearing in the divorce proceeding. Several people unrelated to the case were present in the courtroom. Moreover, many residents of Roby were aware of the allegations against Lance and the identity of Jessica as the victim, before the "Lotto Town" episode was broadcast. Indeed, Mitzi

disclosed to others that Jessica was the victim of sexual abuse, and that Lance was the perpetrator. "[T]here is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye." THE RESTATEMENT (SECOND) OF TORTS § 652D, comment b, *cited in Johnson v. Sawyer*, 47 F.3d 716, 733 (5th Cir.1995). Thus, the matter of Jessica's identity and the circumstances of the sexual assault allegations were not private facts; rather, they were part of an open legal proceeding and generally known to many Roby residents.

> FN5. To the extent that Mitzi asserts an invasion of privacy claim in her individual capacity, that claim fails as a matter of law. *See Justice v. Belo Broadcasting Corp.*, 472 F.Supp. 145, 148 (N .D. Tex.1979) (establishing that a plaintiff may not predicate an invasion of privacy claim on a violation of the privacy rights of others). Further, Plaintiffs complain only of Defendants' publication of Jessica's name and likeness--not Mitzi's.

Notwithstanding the public nature of the sexual assault allegations, Plaintiffs argue that it is immaterial whether all 600 residents of Roby knew of the sexual assault charges because others outside of Roby were not aware of the charges until the "Lotto Town" broadcast aired. Plaintiffs' argument is untenable because it assumes a critical, but missing element of their cause of action, namely, that the published information is private. Where the Court determines that the information is not private, it need not proceed to the "publication" element of the cause of action. Thus, whether the information is published globally or to a single individual is immaterial if it is not of a private nature.

Finally, Plaintiffs suggest that Texas law prohibits the publication of the name of a minor victim of sexual assault. TEX. CODE CRIM. P. ANN. art. 57.02. As such, they contend that Defendants are liable for publishing the information, which Texas law proscribes. The cited article from the Texas Criminal Code does not aid Plaintiffs. Article 57.02 prohibits the publication of a victim's name only where the victim first requests in writing that a pseudonym be used instead of her name. The request is optional. There is no evidence that Mitzi requested that Jessica's name be replaced by a pseudonym in any court proceeding involving the sexual abuse charges. Furthermore, the provision does not prohibit the media from publishing information that has already been made public; rather, the statute only

punishes a "public servant" for violating the statute. *See* TEX. CODE CRIM. P. ANN. art. 57.03.

Plaintiffs have failed to establish, as a matter of law, that Jessica's name and likeness are private facts, such that Defendants' publication of those facts does not constitute an invasion of Plaintiffs' privacy. There is no genuine issue of material fact as to the public nature of Jessica's identity and likeness in connection with Lance's sexual assault charges. Therefore, Defendants are entitled to judgment as a matter of law on Plaintiffs' claim of invasion of privacy.

It is therefore ORDERED that Defendants' Motion for Summary Judgment, filed by Defendants CBS Broadcasting, Inc., *48 Hours,* Chuck Stevenson, Bill Lagattuta, Susan Zirinsky, and Dan Rather, on August 14, 2000, is granted.

It is FURTHER ORDERED that the claims of Plaintiff Mitzi Green, individually, and Jessica Green, by and through her guardian and next friend, Mitzi Green, against Defendants CBS Broadcasting, Inc., *48 Hours,* Dan Rather, Chuck Stevenson, Bill Lagattuta, and Susan Zirinsky are dismissed with prejudice.

It is FURTHER ORDERED that Defendants' Motion to Strike, filed on September 20, 2000, is granted in part and denied in part, as set forth in this order.

IV.

Art. 57.02. Confidentiality of files and records
(a) The Sexual Assault Prevention and Crisis Services Program of the Texas Department of Health shall develop and distribute to all law enforcement agencies of the state a pseudonym form to record the name, address, telephone number, and pseudonym of a victim.
(b) A victim may choose a pseudonym to be used instead of the victim's name to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings. A victim who elects to use a pseudonym as provided by this article must complete a pseudonym form developed under this article and return the form to the law enforcement agency investigating the offense.
(c) A victim who completes and returns a pseudonym form to the law enforcement agency investigating the offense may not be required to disclose the victim's name, address, and telephone number in connection with the

investigation or prosecution of the offense.
(d) A completed and returned pseudonym form is confidential and may not be disclosed to any person other than a defendant in the case or the defendant's attorney, except on an order of a court of competent jurisdiction. The court finding required by Subsection (g) of this article is not required to disclose the confidential pseudonym form to the defendant in the case or to the defendant's attorney.
(e) If a victim completes and returns a pseudonym form to a law enforcement agency under this article, the law enforcement agency receiving the form shall:
(1) remove the victim's name and substitute the pseudonym for the name on all reports, files, and records in the agency's possession;
(2) notify the attorney for the state of the pseudonym and that the victim has elected to be designated by the pseudonym; and
(3) maintain the form in a manner that protects the confidentiality of the information contained on the form.
(f) An attorney for the state who receives notice that a victim has elected to be designated by a pseudonym shall ensure that the victim is designated by the pseudonym in all legal proceedings concerning the offense.
(g) A court of competent jurisdiction may order the disclosure of a victim's name, address, and telephone number only if the court finds that the information is essential in the trial of the defendant for the offense or the identity of the victim is in issue.
(h) Except as required or permitted by other law or by court order, a public servant or other person who has access to or obtains the name, address, telephone number, or other identifying information of a victim younger than 17 years of age may not release or disclose the identifying information to any person who is not assisting in the investigation, prosecution, or defense of the case. This subsection does not apply to the release or disclosure of a victim's identifying information by:
(1) the victim; or
(2) the victim's parent, conservator, or guardian, unless the parent, conservator, or guardian is a defendant in the case.

II.
Opinion of the Fifth Circuit Court of Appeals

United States Court of Appeals,
Fifth Circuit.

Mitzi **GREEN**, Individually; Jessica **Green**, By and Through Her Guardian and Next

Friend Mitzi **Green**, Plaintiffs-Appellants,

v.

CBS INC.; et al., Defendants,

48 Hours; Dan Rather; Chuck Stevenson; Bill Lagattuta; Susan Zirinsky; **CBS** Broadcasting Inc., Defendants-Appellees.

No. 01-10151.

April 3, 2002.

Before JONES, EMILIO M. GARZA and STEWART, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Plaintiffs-Appellants Mitzi **Green** and Jessica **Green** (collectively, the **"Greens")** appeal the district court's grant of summary judgment in favor of Defendants-Appellees **CBS** Broadcasting Inc., *48 Hours,* Dan Rather, Chuck Stevenson, Bill Lagattuta, and Susan Zirinsky (collectively, **"CBS").** On appeal, we must decide whether the district court correctly determined that no genuine issue of material fact existed as to the **Greens'** defamation or invasion of privacy claims **CBS** published and aired a story entitled "Lotto Town" in January 1998 on its weekly news magazine, *48 Hours,* detailing the lives of forty-two lotto millionaires living in the small town of Roby, Texas. One of these lotto winners was Lance **Green,** Mitzi **Green's** ex-husband. In the course of its one- hour broadcast, **CBS** showed how Lance's life changed during the year following his lotto win. The story included, among other events, Lance's divorce from ***283** Mitzi **Green,** his relationship with her daughter Jessica, and Mitzi **Green's** charge that Lance had sexually abused Jessica. During the broadcast, Lance, the **CBS** correspondent Lagattuta, and other Roby residents made several statements referencing Mitzi. These include Lagattuta's statement that Mitzi "wanted more money" from Lance after he won the lotto, and allegations by Lance that she used her daughter to get more money from him. At one point during the hour-long show, Lance and his lawyer expressed their opinion that Mitzi fabricated the sexual assault charges against Lance, and a Roby resident expressed his belief that Lance was innocent. The broadcast also showed Lance pointing out several pictures of Jessica taped to his refrigerator, while referring to her as his "daughter."

As a result of the "Lotto Town" broadcast, the **Greens** filed suit against **CBS,** alleging claims for defamation and invasion of privacy. Specifically, Mitzi **Green** contends that the story falsely implied that she is a liar and a "gold digger," and that the identification of Jessica **Green** in the story as a victim of sexual abuse, along with the publication of her name and likeness, constitutes an unlawful invasion of Jessica **Green's** privacy. The district court concluded

that the defamation claim failed because the **Greens** presented insufficient evidence showing that the statements aired were false and defamatory. The court also rejected the invasion of privacy claim because the broadcast did not publicize any private facts. We agree with the district court's conclusions.

We review a district court's grant of summary judgment de novo. *See Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 167 (5th Cir.2000). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). On a motion for summary judgment, a court must review the facts in the light most favorable to the non-movant. *Peavy*, 221 F.3d at 167.

I

The **Greens** have failed to show that there is a genuine issue of material fact as to whether Mitzi **Green** was defamed by **CBS's** broadcast. To prevail on a **libel** claim, a private citizen plaintiff must establish (1) the defendant published a false statement; (2) the false statement was defamatory, in that it damaged the plaintiff's reputation, exposing her to "public hatred, contempt, ridicule, or financial injury"; and (3) the defendant made the statement with negligence as to its truth. *Dolcefino v. Randolph*, 19 S.W.3d 906, 917 (Tex.App.-Houston 2000, pet. denied). A defendant can defeat a **libel** claim by establishing the "substantial truth" of the statement. *McIlvain v. Jacobs*, 794 S.W.2d 14, 15 (Tex.1990). "A broadcast is substantially true if the allegedly defamatory statement is not more damaging to the plaintiff's reputation, in the mind of the average person, than the truthful statement." *Randolph*, 19 S.W.3d at 918. We look at the "gist" of a broadcast to determine whether it is substantially true. *McIlvain*, 794 S.W.2d at 16. We agree with the district court's conclusion that the facts reported in the broadcast, taken as a whole, were substantially true.

First, the statements identified by the **Greens** as false--that Mitzi took back the daughter he had raised since birth after the **Greens** separated, and that Mitzi wanted a share of the lotto winnings--are, in fact, true. [FN1] The parties do not dispute that Mitzi requested a portion of the lotto proceeds after an initial settlement was reached but before the divorce became final, and that she ultimately settled for less than the half-share she was entitled to under Texas Community Property law. In addition, while the **Greens** object to the

fact that Lance continually refers to Jessica as his "daughter," the **CBS** correspondent clearly states that Jessica is Lance's stepdaughter.[6]

Other statements taken from the broadcast and identified by the **Greens** as defamatory are non-actionable because they merely report allegations. For example, the **Greens** point to portions of the broadcast where Lance says that Mitzi is keeping Jessica from him until he pays her more money, and where Lance and his attorney assert that Mitzi fabricated the charges in an effort to get more money out of Lance. [FN2] In cases involving media defendants, such as this, the defendant need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported. *Randolph,* 19 S.W.3d at 918 (stating media defendants need not establish the substantial truth of reported allegations); *KTRK Television v. Felder,* 950 S.W.2d 100, 106 (Tex.App.-Houston 1997, no writ) (holding defendant need only prove that allegations were in fact made to establish substantial truth). After reviewing the transcript, we conclude that the reported statements reveal only the opinion of the speaker, and are not defamatory.[7]

Finally, the **Greens** assert that in light of the Texas Supreme Court's holding in *Turner v. KTRK Television, Inc.,* even if the broadcast included individual statements that are true, it is still as a whole defamatory. 38 S.W.3d 103 (Tex.2000). In *Turner,* the court held that "a plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way." *Id.* at 115. The *Turner* broadcast questioned a mayoral candidate's involvement in his former client's multi-million-dollar insurance scam. *Id.* at 111. While Turner's role was limited to drafting and probating the client's will, the report gave the

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[6] The statement in dispute was made by Lagattuta, in which he says, "Lance and his wife separated months before the lottery win ... [a]nd his wife took back the stepdaughter Lance had helped raise since birth ... [n]ow Lance's sudden good fortune is opening old wounds. His ex-wife wants money and Lance says she's keeping him from little Jesse until she gets it, charges the ex-wife denies." In addition, during another portion of the broadcast, another Roby resident commented that "[a] little before Lance won these millions, [Mitzi] was divorcing him, and she didn't make any bones, from what I hear, that--that she was gonna divorce him and try to get the alimony out of him....The day or two before the divorce was final, she came back and tore up the papers and said she wanted half the-- the lotto, and he refused her."

[7] The **Greens** object in particular to the following exchange between Lagattuta and Lance's criminal attorney that occurs after the subject of the abuse charges is introduced: Lagattuta: "You believe that a large reason why he's in this mess today is because he's got some money." Roberts: "I think that's the total reason. There's a lot of people out to separate a man from his money."

false impression that he was involved in the conspiracy to fake the client's death. *Id.* at 117-19. Based on these facts, the Texas Supreme Court concluded that the broadcast as a whole was substantially false and defamatory, because it "cast more suspicion on Turner's action than an accurate account would have warranted." *Id.* at 119.

In this case, the **Greens** argue that the "Lotto Town" story as a whole was misleading because **CBS** failed to include relevant information about Mitzi **Green**. For example, **CBS** never reported that Mitzi settled for substantially less than her community property share of the winnings, that Lance had given up visitation rights and requested a legal designation stating that he was not Jessica's biological father as part of the initial divorce settlement, that a medical exam proved that Jessica had in fact been raped, and that Lance had failed one of two polygraph examinations. We are not persuaded by the **Greens'** argument. Although the inclusion of more facts may have resulted in a more balanced broadcast, the broadcast as a whole did not misrepresent the story. The "gist" of the "Lotto Town" story with regard to Lance **Green** was that his wife requested additional money as part of their divorce settlement after he won the lotto, and that she accused him of sexually abusing her daughter Jessica, charges which he denied. Given that **CBS** accurately reported facts, albeit not all of the facts, whether or not the story painted Mitzi **Green** in an attractive light is irrelevant. *See Larson v. Family Violence & Sexual Assault Prevention Ctr. of S. Tex.*, 64 S.W.3d 506, 515-16 (Tex.App.-Corpus Christi 2001, no pet. h.) (holding defendant "cannot be liable for presenting a true account of events, regardless of what someone may infer from the account"). Because the broadcast did not create a false impression of Mitzi **Green's** actions, it is not defamatory.

The **Greens** have failed to show that any genuine issue of material fact exists as to the truth of the alleged defamatory statements, therefore the district court correctly granted summary judgment against them.

II

The **Greens'** claim of invasion of privacy also fails. Although the parties agree that the publication of Jessica's name and picture are not themselves private facts, the **Greens** allege that by tying Jessica's name and image to the sexual assault, **CBS** disclosed embarrassing private facts about her. *Johnson v. Sawyer*, 47 F.3d 716, 734 (5th Cir.1995) (en banc) (stating that publication of non-private information such as names or other identifying facts is an invasion of privacy only where it publicly ties individual to some private occurrence that is intimate and embarrassing); *Ross v. Midwest Comms., Inc.*, 870 F.2d 271, 274 (5th Cir.1989) (holding that rape victim's name and

identity are private facts only when viewed in connection with details of rape). To establish an invasion of privacy claim in Texas, a plaintiff must establish: (1) publicity was given to private matters; (2) publication of such matters would be highly offensive to a reasonable person of ordinary sensibilities; and (3) the matters are not of legitimate public concern. *Indus. Found. of the S. v. Tex. Indus. Accident Bd.,* 540 S.W.2d 668, 682 (Tex.1976). The publication of facts which are matters of public record, no matter how objectionable, does not constitute invasion of privacy. *Johnson,* 47 F.3d at 731 (stating that this "tort does not extend to facts, no matter how intimate, embarrassing, or otherwise private, which [are] a matter of open public record"). The record reveals that the details of sexual assault charge, including the victim (Jessica) and the alleged perpetrator (Lance) were well known throughout Roby. Not only did Lance talk about the charges with "hundreds" of people, Mitzi also disclosed the information to several people. Moreover, the sexual abuse allegation was discussed in open court during Lance and Mitzi's divorce proceedings. [FN3] Texas law is clear that "once information is part of a public record, there can be no liability for publicizing it." *Id.* at 732 (quoting *Gill v. Snow,* 644 S.W.2d 222, 224 (Tex.App.-Forth Worth 1982, no writ)). Thus, because these facts were not private, they are not actionable.[8]

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of **CBS,** as there are no genuine issues of material fact related to the **Greens'** defamation or invasion of privacy claims sufficient to withstand summary judgment.

III.

Opinion of the Fifth Circuit Court of Appeals denying Petitioners' Motion for Rehearing

(Please note that counsel for Petitioner's home has been recently flooded and counsel lost the majority of her files in this case and is unable at the time of the filing of this petition to include a copy of the Order Denying Rehearing. Counsel will supplement as necessary).

IV.

Art. 57.02. Confidentiality of Files and Records

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[8] We note that while the indictment for sexual assault against Lance used a pseudonym instead of Jessica **Green's** name, other court documents filed as part of the divorce proceeding, including Mitzi **Green's** application for a restraining order, specifically identified Jessica as the victim of "family violence."

(a) The Sexual Assault Prevention and Crisis Services Program of the Texas Department of Health shall develop and distribute to all law enforcement agencies of the state a pseudonym form to record the name, address, telephone number, and pseudonym of a victim.
(b) A victim may choose a pseudonym to be used instead of the victim's name to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings. A victim who elects to use a pseudonym as provided by this article must complete a pseudonym form developed under this article and return the form to the law enforcement agency investigating the offense.
(c) A victim who completes and returns a pseudonym form to the law enforcement agency investigating the offense may not be required to disclose the victim's name, address, and telephone number in connection with the investigation or prosecution of the offense.
(d) A completed and returned pseudonym form is confidential and may not be disclosed to any person other than a defendant in the case or the defendant's attorney, except on an order of a court of competent jurisdiction. The court finding required by Subsection (g) of this article is not required to disclose the confidential pseudonym form to the defendant in the case or to the defendant's attorney.
(e) If a victim completes and returns a pseudonym form to a law enforcement agency under this article, the law enforcement agency receiving the form shall:
(1) remove the victim's name and substitute the pseudonym for the name on all reports, files, and records in the agency's possession;
(2) notify the attorney for the state of the pseudonym and that the victim has elected to be designated by the pseudonym; and
(3) maintain the form in a manner that protects the confidentiality of the information contained on the form.
(f) An attorney for the state who receives notice that a victim has elected to be designated by a pseudonym shall ensure that the victim is designated by the pseudonym in all legal proceedings concerning the offense.
(g) A court of competent jurisdiction may order the disclosure of a victim's name, address, and telephone number only if the court finds that the information is essential in the trial of the defendant for the offense or the identity of the victim is in issue.
(h) Except as required or permitted by other law or by court order, a public servant or other person who has access to or obtains the name, address, telephone number, or other identifying information of a victim younger than 17 years of age may not release or disclose the identifying information to any person who is not assisting in the investigation, prosecution, or defense of the

case. This subsection does not apply to the release or disclosure of a victim's identifying information by:

(1) the victim; or

(2) the victim's parent, conservator, or guardian, unless the parent, conservator, or guardian is a defendant in the case.